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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/511,780 02/23/00 BAENSCH

J 8265-305

EXAMINER

020582  
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SUITE 1000  
WASHINGTON DC 20006

IM52/0510

MADSEN, R

ART UNIT

PAPER NUMBER

1761

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05/10/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

**Office Action Summary**

Application No.

09/511,780

Applicant(s)

BAENSCH ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 09 April 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) 1-12 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 13-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119**

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

**Attachment(s)**

- 15) ☒ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2.
- 18) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other:

### DETAILED ACTION

Acknowledgement is made of receipt of the Response to Restriction Requirement filed April 9, 2001, Paper No. 4. Applicant's election with traverse of claims 13-25 in Paper No. 4 is acknowledged. The traversal is on the ground(s) that since product-by-process claims 11 and 12 are directed *essentially* to the same *type* of cream composition as the elected product claims 13-25, claims 11-25 should be examined together. This is not found persuasive because claims 11 and 12, as product-by-process claims read on any cream composition.

The requirement is still deemed proper and is therefore made FINAL.

Claims 1-12 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 4.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 13-15, 17, 20, 22, 24, 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Maiorano et al. (DE 19650106A, English Abstract).

Regarding claims 13-15,17,24,25 Maiorano et al. teach (See English Abstract) a cream composition, which is used to make fillings for biscuits, as recited in claims 24 and 25, comprising 14-20% condensed milk and 4-6% milk protein( 8-20% milk derivative)as recited in claims 13 and 14, 7-10% glucose syrup and 13-15% icing sugar ( 20-30% sugar) as recited in claim 13, 12-16% fresh yogurt and 4-6% yogurt powder (16%-22% fermented dairy )as recited in claims 13 and 15, and 1-2% modified starch, a texturizing agent, or maltodextrin as recited in claim 17.

Regarding claim 20, Mariorano et al. teach fresh yogurt at 12-16%, which simply by definition inherently has a standard range of live bacteria, and would inherently result in a live bacteria level of  $10^4$ - $10^{11}$  per gram of mixture.

Regarding claim 22, Maiorano et al. further teach 35-37 vegetable fat, a molten fatty substance.

Claims 20 rejected under 35 U.S.C. 102(b) as being anticipated by Maiorano et al. (DE 19650106A) as evidenced by Tamime et al.

Maiorano et al. teach adding 12-16% fresh yogurt to the cream composition, and therefore inherently teach live bacteria within the ranges of  $10^4$ - $10^{11}$  per gram of mixture. It is well known in the art that fresh yogurt comprises lactic acid bacteria and that the "satisfactory" standard set by industry is comprise  $>10^8$  per ml for both *S. thermophilis* and *L. bulgaricus*, as evidenced by Tamime, page 393. Even when factoring the density of yogurt, Maiorano et al. further teach live bacteria within the ranges of  $10^4$ - $10^{11}$  per gram of mixture.

Claims 13-15, 24,25 are rejected under 35 U.S.C. 102(b) as being anticipated by Lauro (EP 666031A, English Abstract).

Lauro teaches a cream composition (for filling cookies as recited in claims 24 and 25) comprising 5-25% milk powder as recited in claims 13 and 14, 5-15% yogurt powder as recited in claims 13 and 15, 20-40% mono/di saccharides (or sugars) as recited in claim 13 (English Abstract).

Claims 13,15,16,18, 23 are rejected under 35 U.S.C. 102(b) as being anticipated by Rosen (US 5800855).

Rosen teaches a cream composition comprising 10.3% condensed skim milk as recited in claim 13, 13% cream cheese as recited in claims 13 and 15, 32.2 liquid cane sugar (optionally 21.5% dry sugar in Column 3, lines 7-12) as recited in claim 13, 0.1% vanilla extract as recited in claim 18, 24.3% cream as recited in claim 16, 0.5% of a stabilizing system that comprises salt, and the composition is aerated as recited in claim 23 (Example 1, Column 2 line 28 to Column 4, line 67).

Claims 13,15,16,18,21-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Cavalli (EP 0818149 A2).

Cavalli teaches an aerated cream composition (as recited in claim 23) comprising 1-10% of a milk derivative (i.e. whey) as recited in claim 13, fermented milk product 10-40% if yogurt or 20-60% if cheese as recited in claims 13 and 15, 20-40% sugars as recited in claim 13, 20-60% cream as recited in claim 16, 1.2% of an aromatic product

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(including fruit or honey) as recited in claim 18, molten vegetable fats 20.4 % as recited in claim 22 and a water activity of 0.75-0.94 as recited in claim 21. The composition may be used as a filling for wafers, bakery products, sweet bread, etc. as recited in claims 24 and 25 (Pages 2-4).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 19 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cavalli (EP 0818149 A2).

Regarding claim 19, as discussed above in the rejection of claim 13 above, Cavalli teaches a desired fat content of 20-45% and teaches adding 20.4% molten vegetable fats in the example (Page 3 and page 4), but is silent in teaching the entire range of 10-45% vegetable fats. However, to add any particular level of vegetable fat in addition to the composition would have been an obvious result effective variable of the amount of and fat content of the milk products (i.e., cream, fermented milk products, and milk derivatives) also added to the composition.

Regarding claim 22, although Cavalli is silent in adding salt, salt is a well-known food additive and already present in cheese composition. Therefore, to further add salt at any level would have been an obvious result effective variable of the desired

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saltiness of the product and the relative amount of saltiness provided by the cheese in the composition.


### ***Conclusion***


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Nolte (US 4732772), Giddey (US 4818554), Cajigas (US 4289788), Malavolta et al. (GB 2305844 A), and Ziegler (HU 2144188 A, English Abstract) teach various cream compositions and uses.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 6:30AM-4:00PM, Mon-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)305-3599 for regular communications and (703)305-3599 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)308-0661.

R. Madsen   
May 9, 2001

  
**MILTON I. CANO**  
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